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NO.

IN THE SUPREME COURT OF THE UNITED STATES

TERM, 1987

RONALD TURCHI, PETITIONER

V.

UNITED STATES OF AMERICA

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PRO SE
RONALD TURCHI
NO. 29981-066
UNITED STATES PENITENTIARY
P. O. BOX 1000
LEWISBURG, PA 17837

QUESTION PRESENTED

1. Whether the Petitioner was denied his right to the assistance of counsel when his lawyer at trial was financially and professionally dependent on a lawyer who represented a co-defendant, despite a conflict of interest between the Petitioner and the co-defendant which prevented Petitioner's lawyer from providing Petitioner with competent advise and representation.

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INTRODUCTION

A Writ of Certiorari is respectively sought to review the order of the United States Court of Appeals for the Third Circuit denying Petitioner relief under 28 U.S.C. §2255 and affirming the decision of the United States District Court for the Eastern District of Pennsylvania.

OPINIONS BELOW

The United States Court of Appeals for the Third Circuit denied Petitioner's Appeal by a Judgment Order which affirmed the District Court. The opinion of the United States District Court was not reported but appears at Appendix A. The Report of the United States Magistrate appears at Appendix B.

JURISDICTION

The Judgment of the Court of Appeals was entered on March 3, 1987. A timely filed Petition for a rehearing was denied on

March 26, 1987. The jurisdiction of this court is involved under 28 U.S.C. §1254 and Rule 17 of the Rules of the Supreme Court of the United States.

CONSTITUTIONAL PROVISIONS INVOLVED

This case involves the Sixth (6th) Amendment to the Constitution of the United States, which provides in pertinent part as follows:

> "In all criminal prosecutions, the accused shall enjoy the right...to have the assistance of counsel for his defense."

STATEMENT OF THE CASE

This case arises from the Petitioner's Motion filed pursuant to 28 U.S.C. §2255. Petitioner is incarcerated in the federal penitentiary at Lewisburg, Pa., where he is serving a Forty (40) year sentence. The Petitioner was convicted by a Jury on

on August 3, 1979, of mail fraud, engaging in a pattern of racketeering activities, and conspiracy to engage in a pattern of racketeering activities, in violation of 18 U.S.C. §1341, §1961, §1962 (c) and (d) and §1963, respectively.

The predicate acts for the pattern of racketeering activities involved three (3) separate arsons in the City of Philadelphia, Pa., in 1975, 1976 and 1977. Essentially the Petitioner and his co-defendants were accused of being members of an arson for hire gang that set fires to defraud insurance companies.

In his 2255 Motion, the Petitioner, asserted that he was denied the right to assistance of counsel because his lawyer at trial labored under a conflict of interest caused by a joint representation of a co-defendant.

The Petitioner was represented at trial by James T. Vernile, Esquire of Philadelphia, Pa. One of the Petitioner's co-defendants, Michael Morrone, identified by

the government as the leader of the gang, was represented by Robert F. Simone, Esquire, an experienced criminal lawyer in the City of Philadelphia.

Petitioner's counsel had been an employee of Simone from 1972 until 1979, shortly before he began to represent the Petitioner in this case. During the time that Vernile represented the Petitioner he occupied a free office in Simone's suite, had free use of Simone's law library, office equipment, receptionist and waiting room. Moreover, Vernile regularly performed legal work for Simone and Simone's clients; Simone referred clients to Vernile and Simone paid Vernile each month for the legal work he performed on behalf of Simone or his clients. Therefore, for all intents and purposes, Vernile was the equivalent of an associate attorney in Simone's law office during the time he was representing the Petitioner in this case.

The evidence offered pursuant to the

2255 Motion established, that Petitioner was introduced to Vernile, by Simone at Simone's home during a meeting attended by the Petitioner's co-defendant, Michael Morrone.

In addition most of the money used to pay Vernile came from a fund raising dinner held for both Morrone and the Petitioner. The net proceeds from the dinner were delivered to Simone who in turn distributed some of it to Vernile.

Attorney Vernile testified, before the United States Magistrate assigned to hold evidentiary hearings, that all of his meetings and conversations with the Petitioner included the co-defendant, Morrone and his lawyer, Robert F. Simone. Vernile never met with the Petitioner alone, or in private, during the entire period of their attorney client relationship.

Vernile also testified that he never advised Petitioner of the risk of conviction at trial, never discussed a plea bargain with Petitioner and never discussed the idea

of Petitioner cooperating with the government because the Petitioner claimed he was innocent.

Vernile admitted that the Petitioner's version of his involvement in one of the arsons was incriminating.

Vernile knew before trial that the government considered the co-defendant, Morrone, to be the leader of the arson gang, that the government considered the Petitioner to be a subordinate member of the gang, that Morrone had an extensive prior record while Petitioner had no prior record.

Following the evidentiary hearings in August and September, 1985, United States Magistrate, Edwin E. Naythons, filed a Report, which is attached as Appendix B, and recommended to the District Court that Petitioner be granted a new trial. See Appendix B.

The District Court did not agree with the Magistrate, and denied the Petition.

The United States Court of Appeals affirmed the District Court without an opinion

and denied Petitioner's request for a rehearing on March 26, 1987.

BASIS OF FEDERAL JURISDICTION

This is an action filed by a prisoner in custody under sentence of a United States District Court and is authorized by 28 U.S.C. §2255.

REASONS WHY THE WRIT OF CERTIORARI SHOULD BE GRANTED

First, the facts of this case, reveal an injustice, which should be corrected.

In this case, the evidence showed that during the time that Vernile represented the Petitioner and Simone represented the co-defendant, Morrone, there was a financial and professional interdependency between the two lawyers. Simone paid all or most of Vernile's office expenses and regularly referred legal clients to Vernile. In addition, Simone paid Vernile for the legal work he performed for Simone and Simone's clients on a regular basis.

Therefore, Vernile depended on Simone for continuing financial assistance and pro-

fessional referrals, Vernile had been a professional employee of Simone's for seven (7) years immediately preceeding his representation of the Petitioner and Vernile was junior to Simone in both age and experience at the Bar.

The evidence also showed that Vernile was asked by Simone to represent the Petitioner, that the Petitioner was introduced to Vernile at Simone's home during a meeting attended by the co-defendant, Morrone.

Finally, the money paid to Vernile actually came from Simone, who also determined the amount to be paid to Vernile out of funds raised for the defense of both Petitioner and the co-defendant.

For all intents and purposes Vernile was the equivalent of an associate in Simone's law office.

The conflict of interest between the Petitioner and co-defendant, Morrone, arose from their different level of culpability. The Petitioner had no prior record and was con-

sidered a subordinate member of the gang, while the co-defendant, Morrone, was considered the leader and had a substantial prior record of criminal behavior.

Since both the Petitioner and the co-defendant, Morrone, were present during all their meetings with counsel, both Vernile and Simone were prevented from recommending to the Petitioner that he should consider offering to cooperate with the prosecution, without compromising their duty of loyalty to their other client, the co-defendant, Morrone.

Prior to trial, Vernile knew the government had a strong case which included the testimony of a former member of the arson gang who would incriminate the Petitioner. He also knew that because of Petitioner's subordinate role in the conspiracy and lack of a prior record, there was a good chance for a lenient sentence if Petitioner could plea bargain before trial.

Under the circumstances, it is incon-

ceivable that a competent criminal lawyer would not have discussed plea bargaining with his client unless, of course, he could not do so without compromising his duty to another client.

Therefore the conflict of interest between the Petitioner and his co-defendant Morrone, adversely affected the performance of the Petitioner's lawyer, who otherwise would have been expected to advise Petitioner of the risk of conviction at trial and the desirability of plea bargaining.

This Petitioner had never been arrested before this case, he was unfamiliar with the law and the criminal justice system, he relied on the advise of his lawyer, therefore, he never had an opportunity to consider plea bargaining nor was he given the opportunity to consider cooperating with the government. Instead the Petitioner's lawyer persisted in a defense strategy which only served to protect the interests of his co-defendant, Morrone.

Certainly this is not the assistance of counsel contemplated by the Sixth Amendment to the Constitution of the United States.

This Petitioner went to trial, was convicted and was sentenced to Forty (40) years imprisonment, without having the benefit of the assistance of independent counsel who was representing his interest only.

Your Petitioner prays that this Honorable Court will hear this case and correct this injustice.

In addition, Vernile's conduct, in this case, violated the American Bar Association Standards Relating to the Administration of Justice, the Defense Function.

> "Except for preliminary matters such as initial hearings or applications for bail, a lawyer or lawyers who are associated in practice should not undertake to defend more than one Defendant in the same criminal case if the duty to one of the defendants may conflict with the duty to another." The Defense Function, American Bar Association, Standards Relating to the Administration of Criminal Justice. §3.5(b), p.123 (1974).

Furthermore, the opinion of United States Magistrate, Edwin E. Naythons as contained in his Report to the District Court should have been given more weight in this case.

Magistrate Naythons conducted the evidentiary hearings which revealed the relationship between attorneys Vernile and Simone. At trial, in 1979, the District Court assumed, naturally and properly, that Vernile and Simone were independent of each other.

Therefore Magistrate Naythons saw and heard the witnesses who gave the crucial testimony, so essential to Petitioner's case.

In Glasser v. United States, 315 U.S.60, 86 L.Ed. 680, 62 S.Ct. 457 (1942), this Honorable Court held that the assistance of counsel guaranteed by the Sixth Amendment contemplates that such assistance be untrammeled and unimpaired by a court order requiring one lawyer to represent conflicting interests.

Approximately thirty six (36) years later, in 1978, this Honorable Court, in an

opinion by then Chief Justice Burger, held that a trial court's failure to appoint separate counsel for three defendants accused of rape and robbery, or to take adequate steps to ascertain the risk of a conflict of interest in the face of representations made by counsel of a conflict, deprived all three (3) defendants of their guaranteed right to the assistance of counsel. Holloway v. Arkansas, 435, U.S. 475, 55 L.Ed. 2nd. 426, 98 S. Ct. 1173 (1978).

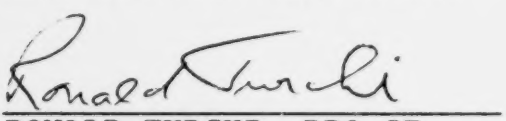
In Holloway v. Arkansas, supra, this Court clearly recognized that, "...in a case of joint representation of conflicting interests the evil...is in what the advocate finds himself compelled to refrain from doing, not only at trial, but also as to possible pretrial plea negotiations and in the sentencing process." 55 L.Ed. 2nd. at 438.

The Court also recognized the virtual impossibility of assessing the impact of a conflict of interests on the attorney options, tactics, and decisions in plea negotiations. Holloway v. Arkansas, 55 L.Ed.2nd.at 438.

These principles should now be extended to hold that multiple representation of defendants by associated lawyers, in the presence of an actual conflict of interest which adversely affects counsel's performance, deprives defendants of their Constitutional right to the assistance of counsel, despite the absence of objection at trial and despite the trial court's ignorance of the multiple representation or conflict of interest until after the trial is concluded.

In Conclusion, your Petitioner prays that this Honorable Court will grant this Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit.

RESPECTFULLY SUBMITTED:



RONALD TURCHI, PRO SE
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LEWISBURG, PA 17837

CERTIFICATE OF SERVICE

I hereby certify that I served three (3) copies of the within Petition for a Writ of Certiorari on the Solicitor General of the United States, Department of Justice, 10th and Constitution N.W., Room 5143, Washington, D.C. 20530 by United States Mail, postage prepaid on the date set forth below.

Date: June 4, 1987

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APPENDIX "A"

MEMORANDUM AND ORDER

DITTER, J. September 17, 1986

Relator, Ronald Turchi, was convicted of conspiracy and mail fraud arising out of the arson of three buildings. He has brought this habeas corpus petition pursuant to 28 U.S.C. §2255 alleging various violations of his rights under the fifth and sixth amendments. Reading the issues raised in relator's petition together with those raised in his subsequently filed memorandum of law, and construing them generously, relator presents claims under four distinct legal theories: counsel's conflict of interest, counsel's incompetence, violation of fundamental fairness, and the government's Brady violation.

I referred this petition to a magistrate who conducted an evidentiary hearing and recommended that the habeas petition be granted on the basis that relator was deprived of his sixth amendment right to effec-

tive counsel as a result of his counsel's conflicting interests. After carefully reviewing the trial record, my files,[1] the transcript of the magistrate's evidentiary hearing, the parties' motions and memorandum of law, the magistrate's report and recommendation, and the parties' objections thereto, I must respectively disagree with his conclusion. The magistrate rejected the relator's fifth amendment Brady claim. As no objections have been raised to this determination, I will not consider it here. I have considered the relator's remaining fifth and sixth amendment claims and conclude that they are also meritless.

I. CONFLICT OF INTEREST

Turchi asserts three separate conflicts of interest based upon three different factual situations, each pertaining to a professional

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[1] I have made a part of the record in this case any materials from my files which I have relied on in this opinion and which were not otherwise matters of record.

relationship his counsel had with other counsel or clients. In order to establish a conflict of interest violative of the sixth amendment, relator must prove each of the following elements. First, he must show multiple representation which means that his counsel actively represented conflicting interests. Second, he must show that the representation of conflicting interests created an actual conflict of interest. An actual conflict of interest exists if, during the course of the representation, the conflicting interests diverge with respect to a material factual or legal issue or to a course of action. Third, he must show that the actual conflict adversely affected his counsel's performance, that is, the conflict must cause some lapse in representation contrary to relator's interests. Actual prejudice need not be shown; however, overemphasis on the presumption of prejudice does not obviate the necessity of demonstrating the existence of an actual conflict. Strickland

v. Washington, 466 U.S. 668, 692 (1984); Cuyler v. Sullivan, 446 U.S. 33, 342-350 (1980); United States v. Gambino, 788 F.2d 938, 951 (3d Cir. 1986); Government of Virgin Islands v. Zepp, 748 F.2d 125, 134-139 (3d Cir. 1984); Sullivan v. Cuyler, 723 F.2d 1077, 1084-1087 (3d Cir. 1983).

A. Vernile and Simone

Relator claims that his counsel, James T. Vernile, Esquire, was ineffective as a result of a conflict of interest resulting from Vernile's professional contacts with Robert R. Simone, Esquire, counsel for co-defendant Michael Morrone. To support this contention, Turchi points to the attorneys' contacts in their practice of law generally, as well as in their preparation and presentation of the defense in this case. The record reveals the following facts.

In 1972, Vernile was admitted to the Pennsylvania Bar and was employed by Simone as an associate in his law offices. As an

associated attorney, Vernile used Simone's office space, facilities, and support staff to do legal work for Simone's clients. In addition, Vernile accepted other legal work which he did independently of Simone's practice and for which he made his own fee arrangements.

As time passed, Vernile's own practice grew and he had less time to devote to Simone's work. As a result, he ended his formal association with Simone and established his own practice. This change occurred prior to the time he assumed Turchi's defense in 1979 and was evidenced by the following: Vernile had his own clients, made his own fee arrangements, employed his own secretary, had his own telephone listing, used stationary with his own letterhead, and reported his own taxes.

Vernile used an office in Simone's suite where he shared with Simone certain common areas such as the library and waiting room. Vernile paid for the use of these

facilities by making appearances for Simone when he was unavailable and preparing legal memoranda for Simone. Additionally, Vernile did legal work for Simone as an "independent contractor" and accepted referrals from Simone. Simone paid Vernile for matters contracted out by him and done on his behalf; Vernile's clients paid him for the work which was referred. Turchi, Vernile, and Simone each testified that Simone referred Vernile to Turchi[2] and that Turchi paid Vernile's legal fee, although there was some question as to whether Turchi gave the money directly to Vernile or whether it was delivered by Simone. The fact that Vernile was retained and paid by Turchi, independently of Simone, is further demonstrated by Vernile's post-trial desire to withdraw from the case, in part, as a result of Truchi's failure to pay outstanding expenses owed to Vernile.

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[2] Vernile was only one of several attorneys Simone suggested to Turchi. Vernile apparently was Turchi's choice.

At the hearing before the magistrate, prosecutor Ronald Cole, Esquire, testified that he knew that Vernile and Simone shared office space, but assumed from Vernile's letterhead that he was an independent practitioner. Cole did not know that Vernile had worked for Simone in the past or that Simone had referred Turchi to Vernile. Turchi, having already been apprised of the importance of independent counsel, see infra at 13-16, raised no objections until the present habeas petition concerning a conflict of interest. Consequently, I, of course, was unaware at trial of Vernile's past or present professional contacts with Simone, or of any other circumstances that would urge further inquiry into the possibility of conflict.

The facts introduced by Turchi in the evidentiary hearing fail to establish that Vernile was either a formal or de facto associate in Simone's practice of law during the time of relator's trial in 1979.

While the evidence indicates that Vernile and Simone had continuing professional contacts in 1979, there is no evidence that their practices were interdependent formally, financially, or otherwise. Neither is there any indication that Vernile was subordinate to Simone, or felt obligations or loyalties to either Simone or Morrone because of Vernile's professional contacts, or for any other reason.

In the absence of these concerns, which underlie the Disciplinary Rules and Ethical Considerations set forth in Canon 5 of the Code of Professional Responsibility, I will not infer that Vernile represented conflicting interests on the basis of shared office space, referrals, or unrelated work performed as payment for rent or as an independent contractor on an as-needed basis. See United States v. Badalamente, 507, F.2d 12, 20-21 (2d Cir. 1974), cert. denied, 421 U.S. 911 (1975) (held no conflicting interests where record showed that

attorneys shared office and secretary, but interests did not overlap in acceptance of clients or sharing of fees); United States v. Bell, 506 F.2d 207, 224-25 (D.C.Cir. 1974) (held no conflicting interests where evidence disclosed that attorneys shared office space but practiced independently). Consequently, I conclude that there was no multiple representation.

Turchi also contends that conflicting interests arose out of Vernile's contacts with Simone during the preparation and presentation of the defense in this case. He bases this argument on the fact that Vernile, as well as the other defense attorneys, met with Simone to plan the defense together and allowed Simone to proceed first on cross-examination.

If this were sufficient grounds to establish multiple representation, a conflict would arise every time multiple defendants maintain a common defense. It is unrealistic to expect that defense attorneys presenting a

common defense will not discuss trial strategy and procedure. In the absence of undue influence, or other facts evidencing multiple representation, it is desirable that they do so in order to present a common defense effectively and to facilitate the orderly conduct of the trial. In this case, Simone and Vernile agreed on a common defense strategy - to discredit the government's chief witness, Richard Coppola, and to blame him for the arsons. Simone went first on cross-examination because Morrone was named as the first defendant, and it was agreed that the defendants would proceed in the order that they were named in the indictment so far as opening addresses, cross-examination, and the presentation of defenses were concerned.[3]

There is no evidence that Simone controlled Vernile or that Simone and Vernile jointly represented their clients Morrone and

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[3] See N.T. July 17, 1979, at 1-54.

Turchi. Thus, this case is distinguished from Sullivan v. Cuyler, 593 F.2d 512, 518-19 (3d Cir. 1979), as revealed by contrasting the two cases on each of the following material facts: (1) Vernile and Simone entered separate appearances for separate clients rather than entering joint appearances on behalf of each client; (2) Vernile and Simone considered themselves independent counsel for their respective clients rather than "associate counsel" for both co-defendants; (3) Turchi paid Vernile for his representation rather than allowing Morrone to pay both Vernile and Simone; (4) Vernile and Simone, with the other defense attorneys, presented a common defense but did not assist in the defense of each other's clients by making objections or arguments on their behalf or by jointly examining witnesses; (5) there is no evidence that Vernile and Simone hired one investigator or conducted one investigation; (6) there is no evidence that the two attorneys advised each other's clients

concerning the course of action at trial and (7) there is no evidence that the trial strategy of the two attorneys differed or that the strategy ultimately chosen favored a co-defendant rather than relator. Consequently, I conclude that Vernile's contacts with Simone in the preparation and presentation of the defense fail to establish multiple representation.

Although I have concluded that neither Vernile's law practice nor trial contacts with Simone created multiple representation, which is a necessary predicate to further analysis, I will nevertheless examine the two remaining elements required to show ineffective assistance of counsel based upon a conflict of interest. For the purpose of this discussion, I will assume that relator has established multiple representation. Even so, there is no evidence that these conflicting interests ever resulted in an actual conflict.

Turchi complains that Vernile never

met with him privately to discuss the possibility of pleading guilty and cooperating with the government in order to obtain more lenient treatment. Turchi points to Morrone's criminal record and his own lack thereof and ironically contends that the weakness of his own case and the strength of the government's case make it obvious that the only reason Vernile did not suggest pleading guilty and testifying against Morrone was because Vernile's loyalties were divided by his association with Simone. Thus, Turchi asks me to infer the existence of an actual conflict - divergent interests concerning a guilty plea and cooperation with the government - from the fact that Vernile did not discuss with him these possibilities.

Turchi's argument, based entirely on inference, ignores three obvious points. First, there has been no suggestion, much less any evidence, that Vernile was unavailable or unwilling to meet alone with Turchi to discuss these options on any of the 52

days between the time Vernile entered his appearance and the date the trial started, during which time Turchi was out on bail and not in a prison cell with Morrone. On this point, what Turchi does not say is more instructive than the things he does. For example, Turchi does not say that Vernile did or said anything to indicate that they could not meet together in private, or that he did not know he could meet with Vernile in private, or that he ever wanted to meet with Vernile in private, or that he ever asked to meet with him in private and that Vernile refused. Second, Turchi seems to have forgotten that he had strategic reasons for presenting a common defense rather than hoping to curry favor by pleading guilty and testifying against Morrone. See infra at 23-25. Third, Turchi could have pleaded guilty, hoping to obtain a lenient sentence, without testifying against Morrone. Although the prosecutor may have wanted such testimony, that does not mean that Turchi would have

had to provide it. In other words, there are many possible explanations for Vernile's failure to suggest a guilty plea or cooperation and there is no necessary connection between Vernile's conduct and any loyalty to Simone.

More importantly, the evidence negates the inference that Vernile's failure to initiate plea discussions with Turchi was the result of any conflict of interest. Vernile testified that he did not discuss a guilty plea with Turchi because Turchi maintained his innocence throughout the trial; Vernile believed Turchi was innocent; and Vernile believed that he would be able to discredit the testimony of the government's chief witness. See infra 23-25. This testimony is uncontradicted and is corroborated by Turchi who testified before the magistrate that Vernile repeatedly told him not to worry about being convicted because the government did not have a case.

While in retrospect it is easy to

contend Vernile should have met with Turchi alone to discuss the various options available to Turchi, it is quite another thing to conclude that because Vernile did not suggest such a meeting, he was trying to serve two masters. When a perfectly plausible reason for Vernile's omission appears on the record and is uncontradicted, I will not speculate and with the dubious aid of hindsight conclude that the failure to discuss a plea was the result of an actual conflict caused by counsel's divergent interests. Turchi's unsupported and conclusory allegations do not warrant this dangerous second-guessing and unjustifiable condemnation of counsel's motives.

Turchi's failure to support his claims with evidence of an actual conflict distinguishes this case from Sullivan v. Cuyler, 723 F. 2d 1077, 1086-87 (3d Cir. 1983), where relator's own counsel testified that an actual conflict arose concerning relator's defense strategy and counsel chose the course

of action which favored a co-defendant over the relator. This case is also distinguished from Government of Virgin Islands v. Zepp, 748 F.2d 125, 135-40 (3d Cir. 1984), where the existence of an actual conflict between counsel and relator was conclusively demonstrated by counsel's course of action at trial which could only have inured to counsel's benefit and to the relator's detriment. See Gambino, 788 F.2d at 953 (Zepp lent itself to one conslusion: counsel labored under an actual conflict of interest). Here there is nothing like that. There is no evidence that the decision to pursue the benefits of a common defense rather than the benefits of a guilty plea was made with anything but Turchi's best interest in mind.

In sum, even if it is assumed that Vernile's professional contacts with Simone resulted in multiple representation, Turchi has not shown a sixth amendment violation because he has not shown that an actual conflict arose during the course of the

representation. Consequently, he can not show that an actual conflict caused some lapse in representation contrary to his interests.

Finally, I note that had Vernile represented multiple interests resulting in an actual conflict, it would have been brought about by Turchi's ignoring the advice that I gave him and avoiding the precautions that were taken to avoid such a conflict. On April 20, 1979, approximately one month after the indictment was returned in this case, I learned from the government's attorney that Timothy J. Gorbey, Esquire, had entered his appearance for Turchi and co-defendant, David DiStasio, that Gorbey expected to represent only one of them at trial, and that an attempt was being made to obtain counsel for the other.

On April 23, 1979, I wrote to Gorbey asking him to make every effort to have counsel for the defendant whom he would not be representing present for a pre-trial con-

ference that was scheduled for April 30. I added that if it would be necessary for me to appoint counsel, Gorbey should let me know.

I met with all counsel on April 30. At that time, Gorbey still represented Turchi and DiStasio. Agains I brought up the matter of Gorbey's representing both defendants and it was agreed that unless another attorney entered an appearance by May 7, 1979, Gorbey would on that date appear in court with Turchi and DiStasio to explain what had been done to retain another attorney. I also told Gorbey that if at that time he still represented both clients, I would appoint the Public Defender to represent one and he could represent the other. Several days after this April 30 meeting with counsel, I talked with Turchi in chambers and personally explained to him the importance of having independent counsel.

On May 1, 1979, I wrote to Gorbey to confirm our conversation of the day before and our agreement that he could not represent

both Turchi and DiStasio. I also confirmed my understanding that Gorbey would explain this to Turchi and DiStasio. I then repeated that if additional counsel had not entered an appearance by noon on May 7, I expected Gorbey to appear with both defendants in court and I would take whatever action I felt to be appropriate.

On May 7, 1979, Gorbey appeared with Turchi. Gorbey stated that he had entered his appearance for both Turchi and DiStasio, that DiStasio wanted Gorbey to continue to represent him, that Turchi had been in touch with Stan Smuckler, Esquire, who could be expected to enter his appearance for Turchi the next day, and that consequently, Turchi did not want to have counsel appointed. Turchi confirmed that he believed Smuckler would be entering his appearance the next day.

When no appearance was entered by Smuckler or anyone else by May 11, I appointed the Public Defender to represent Turchi. Albert John Snite, Jr., Esquire, of that

office, immediately began the active defense of Turchi. He signed two pre-trial motions as Turchi's counsel and on May 21, represented Turchi at a hearing concerning the Speedy Trial Act.

On May 25, 1979, Vernile entered his appearance for Turchi and trial started on July 17. During this time, Turchi was apparently unconcerned about Vernile's contacts with Simone, as he raised no objections then or at trial about a potential conflict of interest, and this despite the knowledge gained through his previous experience with Gorbey.

I have recited these matters in considerable detail in order to place into context Turchi's choice of Vernile as counsel. It is plain to me that Turchi chose to be represented by Vernile despite a complete awareness of the matters about which he now complains - that he and Vernile had never met alone together, and that Vernile and Simone shared office space - and despite his knowledge that one attorney should not represent

two clients, that there were other attorneys to whom he could turn, that the Public Defender was actively engaged in his defense and that I would take measures to prevent multiple representation. While Turchi did not expressly waive his right to independent counsel, his actions demonstrate that he knowingly accepted whatever conflict existed. See Cuyler, 446 U.S. at 346-47 ("Absent special circumstances,... trial courts may assume either that multiple representation entails no conflict or that the lawyer and his clients knowingly accept such risk of conflict as may exist.") In any event, while I find Turchi's multiple representation argument contrived and disingenuous, a waiver or assumption of risk anaylsis forms no part of my conclusion that there was no conflict of interest.

The rest of the District Court's opinion involves issues not raised in this Petition.

NO.

IN THE SUPREME COURT OF THE UNITED STATES

RONALD TURCHI, PETITIONER

V.

UNITED STATES OF AMERICA

APPENDIX "B"

REPORT - RECOMMENDATION

EDWIN E. NAYTHONS DECEMBER 19, 1985
UNITED STATES MAGISTRATE

The Sixth Amendment to the United States Constitution states, "In all criminal prosecutions, the accused shall...have the Assistance of counsel for his defense." In this federal habeas corpus motion now before this Court, we are asked by the relator, Ronald Turchi, to decide the difficult question of whether his Sixth Amendment right to effective assistance of counsel has been violated.

I.

PROCEDURE HISTORY

The petitioner was convicted on August 3, 1979, by a jury of mail fraud, engaging in a pattern of racketeering activities, and conspiracy to engage in a pattern of racketeering activities, in violation of 18 U.S.C. §1341, 1961, 1962(c) and (d), 1963, respectively. The predicate acts of racketeering

activities consisted of violations of 18 Pa. C.S.A. §3301(b)(1).[1] The nineteen count indictment had charged that the petitioner, along with several other co-defendants, was part of a conspiracy that set fire to three separate buildings with the intention of destroying and damaging these buildings.[2] In connection with the fires at East Orthodox Street and Woodland Avenue, the indictment charged that the petitioner and the co-defendants were involved in a scheme to defraud and obtain money from the insurance companies insuring those buildings.[3]

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[1] §3301(b)(1) provides:
"(b) Endangering property-A person commits a felony of the second degree if he:
(1) starts a fire or causes an explosion with intent of destroying a building or occupied structure of another." (1973 Code).

[2] The buildings were located at 1150 East Orthodox Street, 7229-31 Woodland Avenue, and 62-66 Noth Front and Arch Streets, all in Philadelphia, Pennsylvania.

[3] Both Moderwell L. Kester, owner of the building at 1150 East Orthodox Strret, and William Fox, whose wife was the sole shareholder of the corporation that owned and operated a bar at the Woodland Avenue location were named as co-defendants.

The government's chief witness in the case was Richard Coppola, an admitted participant in all 19 counts of the indictment. Coppola had entered into a plea bargain agreement with the United States Department of Justice on November 28, 1978; and his incriminating testimony regarding the petitioner and the other co-defendants was part of that agreement.

After a trial that lasted more than two weeks, the petitioner was convicted by a jury of Counts One through Nine, involving the mail fraud offenses (18 U.S.X. §1341) in connection with an insurance policy on the East Orthodox Street location; and Counts 18 and 19 which involved the aforementioned RICO charges (18 U.S.C.§1961, 1962(c) and (d), 1963) regarding the fires at all three locations. Pursuant to these convictions, the Honorable J.William Ditter, Jr., sentenced the petitioner to two consecutive 20-year terms and eight five-year terms to run concurrently with the two 20-year terms.

In this motion the relator now contends that he was denied effective assistance of counsel as guaranteed by the Sixth Amendment due to the conflicts of interest that affected his counsel's performance both at the pre-trial and trial stages of his defense. The petitioner further alleges that the government attorney in charge of the case failed to reveal to the defendant or trial judge his knowledge of potential exculpatory evidence.[4] This Magistrate granted an evidentiary hearing on this motion to develop the facts regarding the alleged conflict of interest claims in a Memorandum and Order dated July 23, 1985.. After conducting the evidentiary hearing on August 15, and September 4 of this year, it is the opinion of this Magistrate that, for the reasons set forth below, the motion to vacate and set aside the sentence pursuant to 28 U.S.C. §2255 should be granted and that

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[4] The foregoing is a clarification of the petitioner's arguments.

petitioner receive a new trial.[5]

II.

FINDINGS OF FACT

THE PROFESSIONAL RELATIONSHIP BETWEEN JAMES T. VERNILE, ESQ. AND ROBERT F. SIMONE, ESQ.

James T. Vernile, Esq. was the petitioner's trial counsel while Robert F. Simone was trial counsel to Michael Morrone, a co-defendant in the case. Vernile was admitted to the Pennsylvania Bar in 1972 and immediately thereafter became an employee of Simone as an associated attorney in his already established law practice (A-12).[6] While the two attorneys were in this employer-employee relationship,

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[5] It should be noted that counsel for the Petitioner at the evidentiary hearing stated that in this petition, he seeks only to vacate the convictions regarding Counts 18 and 19 of the Indictment. However, due to the nature of this claim, that is, an ineffective assistance of counsel claim, this decision pertains to all the counts in the indictment for which the petitioner was convicted.

[6] Unless otherwise indicated, all references to the evidentiary hearing transcript of August 15, 1985 will be referred to as ("A"-page number), while all references to the evidentiary hearing transcript of September 4, 1985 will be referred to as ("B"-page number).

Vernile occupied office space in Simone's suite in the Robinson Building in Philadelphia; used Simone's law library, office equipment, receptionist, and office waiting room (A-19, 20; B-7). In addition to being an employee of Simone at this time, Vernile also maintained his own practice using the facilities provided by Simone (A-16, 17).

Shortly before the trial in the case was to begin in July, 1979, Vernile commenced his representation of the petitioner. At the evidentiary hearing, Vernile stated that by the time he was representing the petitioner, "[Simone and I] had changed the relationship and I was conducting my own practice" (A-14). The facts presented in this case and the rest of the testimony offered at the hearing, however, are inconsistent with that statement. At the time Vernile represented Turchi, he continued to share the following with Simone: his office, the law library, the waiting room, office equipment, and the receptionist (A-14,19). Also, during the period of Vernile's representation of

Turchi, and in fact up to the time of the evidentiary hearing, Vernile continued to perform legal services for both Simone and Simone's clients. Vernile testified that he still performed the following duties for Simone: cover hearings that Simone was unable to attend; make motions to continue cases while Simone was occupied; write legal briefs and memoranda; attend depositions in civil cases; appear in court on Simone's behalf for his clients; and generally cover for Simone while he was away on vacation or business (A-15,20,23). Also during this time, Simone would refer legal work directly to Vernile which he would then handle a clients of his own, and set his own fee arrangement (A-21). In those cases in which Vernile would assist Simone in his representation of a particular client, Simone would compensate Vernile for that work (A-22).

Vernile also testified that from the time he started practicing with Simone in 1972 up to and including the time he was

representing the petitioner, he would frequently consult with Simone concerning legal matters. He stated that he regularly asked his advise on trial strategy and tactics that he would then employ vis-a-vis his own clients.

In light of all this evidence, Vernile maintained that he had, "changed his relationship" with Simone prior to his representation of Turchi, although he is not sure when this change took place (A-14,16). To support his assertion that the relationship was different, Vernile points out the following alleged changes: 1. he obtained his own secretary (this happened to be the same secretary that Simone had formerly supplied him with); 2. changed his stationary, and 3. obtained a phone in his name (A-16-19). In addition, Vernile stated that as a part of the "breaking up arrangement, Simone gave him various equipment that he had been using prior to the separation (A-19).

Simone's testimony at the hearing regarding his relationship with Vernile at the time

he represented the petitioner was the following: "In 1979, Mr. Vernile worked out of my suite. He had an independent office and he did work for which I paid him--I wouldn't say he was an employee. He was like an independent contractor but he did work for me. In exchange for the work he did for me, he received free phone, free office; most of expenses were paid by me and I did also give him a certain sum of money on a weekly basis or a monthly basis. I don't recall. In addition, he had his own law practice which was independent of anything he did for me" (B-7).

Simone further testified that Vernile's representation of the petitioner was, "one of those matters that was independent of Jimmy [Vernile] working for me[sic]. In other words, he made his own fee arrangement with him"(B-8). This Magistrate finds that based on the other evidence presented at the hearing and the circumstances regarding the presentation of the defense by Simone and Vernile, which will be

discussed below, this latter testimony lacks credibility and is therefore rejected.

THE PRESENTATION OF THE DEFENSE

The testimony offered at the evidentiary hearing revealed that Vernile's representation of the petitioner commenced in 1979 as a direct result of a phone call from Simone to Vernile asking him to meet the petitioner at Simone's apartment in Center City (A-24,25; B-9,41). Present at this meeting were Simone, Vernile, the petitioner, and a co-defendant Michael Morrone (A-25, B-41). All subsequent meetings between the petitioner and Vernile were also attended by Simone, co-defendant Morrone, and sometimes other co-defendants and their counsel, hence there was never a meeting with just Vernile and petitioner alone (A-36,37; B-42). The evidence further reveals that Vernile never attempted to discuss or review with the petitioner non-trial options such as the possibility of offering a guilty plea to one or more of the charges or offering to cooperate with the government in return for

lenient treatment(A-37; B-43,44).

As mentioned above, the government's chief witness against the petitioner (and the other co-defendants) was Richard Coppola, an admitted participant in the crimes charged in the indictment. At the evidentiary hearing, Simone testified that he had previously met with Coppola in his office on one or two occasions at which time Coppola stated that he was charged with certain Federal crimes and needed representation at a preliminary hearing relating to one or more fires[7]. Simone further related that Coppola was, "all bandaged up" but denied any involvement in the fires[8] (B-13, 34). During the trial, Coppola was extensively

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[7] Although it is not stated clearly in the testimony presented at the evidentiary hearing, it is clear from the trial record that the "fires" referred to here are the same fires involved in the indictment against the petitioner and the co-defendants.

[8] The significance of this evidence is that the trial record revealed that Coppola was burned badly during the Archway Tavern fire. [See, Trial Transcript, July 20, 1979, pp.508A (cross examination of Coppola by Simone)].

cross examined by Simone and Vernile, however, the information Simone obtained during these one or two meetings with Coppola was not gone into during that cross-examination.[9]

The evidence adduced at the evidentiary hearing further indicated that Simone and Vernile represented Archway Tavern, Inc. in 1975 and 1976 in connection with a fire insurance claim regarding the very same fire charged in the indictment against the petitioner and the co-defendants. In connection with this insurance claim, the petitioner introduced the transcripts of sworn statements by both Camillo D'Amico and Thomas Nicolucci,the owners of Archway Tavern. The front pages of these transcripts reveal that Vernile entered appearances for Simone in connection with this matter (see Exhibit

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[9] This, of course, is assuming that Coppola waived his attorney-client privilege with regard to these matters when he testified for the government about his involvement in the fires. There was no problem with the attorney-client privilege at the evidentiary hearing as Coppola is now deceased.

#1.[10] Both D'Amico and Nicolucci gave sworn statements in the presence of Vernile that they had no knowledge of who was responsible for setting the fire at Archway Tavern and denied any personal involvement in that fire (see Trancript of sworn statements; May 18, 1976 and June 24, 1976). The evidence further revealed that Ronald Essner, who owned the building in which Archway Tavern was located, was a social acquaintance of both Vernile and Simone. Both Archway Tavern and Ronald Essner were named in the indictment (Counts 18 and 19). Neither Vernile nor Simone, however, attempted to contact or subpoena D'Amico, Nicolucci, or Essner to testify for the defense at trial or introduce their sworn statements as evidence (A-49,50).

Simone was the lead defense counsel with regard to the group of defendants accused of arson and would begin the cross-examination

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[10] Evidently, this was one of the matter that Vernile handled for Simone as an employee.

of each government witness. With regard to overall trial strategy and tactics, Vernile stated that his defense of the petitioner conformed to Simone's strategy and plans (A-39, 40). There is conflicting testimony as to whether the petitioner paid attorney's fees to Vernile or to Simone in connection with his defense. Vernile stated he did not remember whether the money he was paid to represent the petitioner came from Simone or directly from the petitioner but that, "it's possible it came through Simone" (A-26, 46). The petitioner stated that he paid the fee to Simone with the understanding that Simone would pay Vernile (T-42,43).[11] According to Simone, the petitioner made his own fee arrangement with Vernile but did not

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[11] The petitioner stated that a benefit dinner was held to raise money for his attorney's fees and the entire "eight or nine thousand dollars" collected at the dinner was, "turned over to Simone" (B-42,43).

say who actually received the money.[12]

III.

ANALYSIS

THE CUYLER STANDARD

It is well settled that in order to establish a violation of the Sixth Amendment right to effective assistance of counsel based on the fact that counsel represented conflicting interests, a petitioner must demonstrate that, "an actual conflict of interest adversely affected his attorney's performance." Cuyler v. Sullivan, 446 U.S. 335, 348 (1980) emphasis added); see, Strickland v. Washington, ____U.S.____, 104 S.Ct. 2052, 2067 (1984); Government of Virgin Islands v. Zepp, 748 F.2d 125, 134 (3rd Cir. 1984); Sullivan v. Cuyler, 723 F. 2d 1077,

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12 The importance of this issue lies in the fact that the aforementioned testimony indicated that in those matters where the two attorneys worked together, Vernile would be paid by Simone, while in those matters which Vernile handled "independently", he received the fee directly from the client.

1085 86 (3rd Cir. 1983). Relying on language both in Glasser v. United States, 315 U.S. 60, 76 (1942), stating that unconstitutional multiple representation is never harmless error; and Holloway v. Arkansas, 435 U.S. 475; 490-91 (1978), stating that an inquiry into a claim of harmless error in situations involving conflicts of interests would require "unguided speculation", the Supreme Court in Cuyler reasoned that in this type of situation, prejudice is presumed. Cuyler, 446 U.S. at 349-50; see also Strickland, 104 S.Ct. at 2065; Sullivan, 723 F.2d at 1086-87.[13] Therefore, a defendant who demonstrates that an actual conflict of interests adversely affected the adequacy of his attorney's performance need not

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[13] As this Circuit pointed out, prejudice is presumed because a defendant represented by an attorney serving two clients with contradictory interests is, in effect, denied his right to counsel altogether. United States v. Baynes, 687 F.2d 659, 669 (3rd Cir. 1982); See, e.g., Holloway, 435 U.S. at 489.

demonstrate prejudice to obtain relief. However, the defendant must show that his counsel actively represented conflicting interests before establishing, "the constitutional predicate for his claim of ineffective assistance of counsel" Cuyler, 446 U.S. at 350. Hence, the inquiry must now focus on whether the petitioner's counsel actively represented conflicting interests that presented an actual[14] conflict which adversely affected his performance.[15]

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[14] It is important to focus on the word "actual". "The mere possibility that a defendant's attorney may have a conflict of interest is insufficient to demonstrate a deprivation of the defendant's Sixth Amendment right. Only an actual conflict of interest would establish such a violation." Bailey v. Redman, 657 F.2d 21, 24 (3rd Cir. 1981); See Cuyler, 446 U.S. at 350.

[15] This two-pronged standard announced by the Supreme Court in Cuyler, (there must be an actual conflict that adversely affected the attorney's performance), has been interpreted to be really only a one-step approach by both the Fifth and Eleventh Circuits. These Courts have held that since prejudice is presumed in these situations the Supreme Court did not intend to require a showing that there be an

(Footnote continued on next page)

15 Footnote continued

adverse effect on the attorney's performance. Therefore, these courts have held that once an actual conflict of interest is established, the inquiry is over. See Baty v. Balcom, 661 F.2d 391 (5th Cir. 1981); Barham v. United States, 724 F.2d 1529 (11th Cir. 1984) cert. denied ____U.S.____, 104 S.Ct. 2687 (1984); Westbrook v. Zant, 704 F.2d 1487 (11th Cir. 1983). There is no question that the Supreme Court intended that this analysis include whether the attorney's performance was adversely affected. The point these courts were missing was that this standard cannot be separated into two mutually exclusive points of analysis. (It should be noted that both these points were part of the same sentence in Cuyler). In order to determine whether there was an actual conflict of interest, which is the legal conclusion, it is imperative to focus on whether the attorney was adversely affected in his representation of a client by the circumstances surrounding that representation. Hence, the "two-prongs" of the standard announced in Cuyler must be considered together in order to determine whether there was a Sixth Amendment violation. This, in fact, is the only way to determine if the conflict was an actual conflict rather than being just the mere possibility of a conflict (see N.14, supra).

THE APPLICATION OF THE STANDARD

When evaluating any ineffective assistance claim, a careful inquiry into the particular facts surrounding each case is necessary and consideration must be given to many relevant factors. United States v. Baynes, 687 F.2d 659, 665 (3rd Cir. 1982); Hawkman v. Parratt, 661 F.2d 1161, 1171 (8th Cir. 1981). Hence, a review of the totality of the circumstances in this case is necessary.

At the onset, it is beyond doubt that during the representation of the petitioner in 1979, his attorney, James T. Vernile, was so closely associated with Robert R. Simone, the attorney for co-defendant, Michael Morrone, that the two were members of the same firm. It is also clear that due both to the nature of the relationship between Simone and Vernile, and Simone's position as lead counsel, the petitioner's defense was actually guided by Simone. Hence, for the purpose of this

analysis, Simone and Vernile will be considered as one attorney representing differing interests.[16]

The evidence revealed that during the representation of the petitioner, Simone and Vernile shared office space, equipment, a law library, a waiting room, and a receptionist.

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[16] Although this is not the usual situation where one attorney represents two or more co-defendants, the analysis should be no different when two attorney's from the same firm represent two co-defendants. See, e.g., Ross v. Heyne, 638 F. 2d 979 (7th Cir. 1980); United States v. Donahue, 560 F.2d 1039 (1st Cir. 1977); see generally Model Code of Professional Responsibility Disciplinary Rule 5-105(b), [providing that, "if a lawyer is required to decline employment or to withdraw from employment", because of a potential conflict, "no partner or associate of his or her firm may accept or continue such employment']. This is especially true here given the close relationship that existed between Simone and Vernile and the circumstances surrounding this case. The government does admit that members of the same firm may be considered as one attorney. See Brief for the Government, at 5.

As the government correctly points out, this alone would not have given rise to an actual conflict of interest, citing United States v. Badalamente, 507 F.2d 12 (2nd Cir. 1974), cert. denied, 421 U.S. 911 (1974); United States v. Bell, 506 F.2d 207 (D.C. Cir. 1974). A careful reading of Badalamente reveals that the court stated, "the record does not show that [the two attorneys] were partners and that their interests overlapped in the acceptance of fees. At most, it shows that they worked in close physical proximity, that they shared an office and perhaps a secretary. We think this is an insufficient basis on which to erect a claim of conflict of interest." Badalamente, 507 F.2d at 21 (emphasis added). The instant case is clearly distinguishable. Here, not only did Vernile and Simone share office space, supplies, equipment, a waiting room, and a receptionist, but continued to work on matters together. It is undisputed that the two attorneys initially were in an employer-employee relationship and after that

relationship was alleged to have terminated, Vernile continued to perform legal services for Simone. He would cover hearings for him, write briefs, attend depositions and answer client questions. In return Vernile would receive compensation for the work he performed for Simone, either in the form of free rent, use of the office equipment or in cash. Also, Simone paid most of Vernile's expenses and paid him "a certain sum of money on a weekly or monthly basis" (B-7). Moreover, Simone continued to refer legal work directly to Vernile. In fact, this is exactly how Vernile's representation of the petitioner commenced.

Confronted with this evidence, the government cavalierly argues that, "the fact that Vernile compensated Simone for the use of the shared facilities by performing legal work for Simone does not affect the rationale of these cases (Badalamente and Bell)," citing no authority. However, as mentioned above, the Badalamente court specifically stated that

the record in that case did not show any employment relationship nor did it show that the attorney's interests overlapped in the acceptance of clients or sharing of legal fees. Hence, a closer examination of Badalamente reveals that these types of facts (which are all present in the instant case) would "alter the rationale," which common sense dictates that it should. Moreover, here, the evidence indicated that the relationship between Simone and Vernile had remained essentially the same from the time Vernile commenced practice with Simone up to the time of the evidentiary hearing including the period that Vernile represented the petitioner.

Both before and after the "employer-employee" relationship was alleged to have been terminated, Vernile maintained his own clients as well as performed legal services for Simone. Hence, the government's argument that this change of relationship is evidenced by the fact that both attorneys had their own stationary in 1978-79 (See Government Exhibits

1-3) is, at best, a weak one. It is extremely likely that since Vernile handled his own clients from the beginning, he would have his own stationary. Moreover, even assuming arguendo that the two attorneys changed their stationary, this would not alter the analysis in this case given the aforementioned evidence regarding their relationship and the way in which the presentation of the defense was conducted.

If the fact that Simone and Vernile were members of the same firm due to the circumstances surrounding their business relationship (hence can be treated as one attorney in their representation of the petitioner and a co-defendant) was the only evidence offered to show a Sixth Amendment violation based on an actual conflict of interest, it would be an insufficient basis to erect a claim. The mere fact that an attorney represents two or more co-defendants in the same criminal proceeding does not render that attorney's representation ineffective contravening

Sixth Amendment principles. Holloway, 435 U.S. at 482; Cuyler, 446 U.S. at 348.[17] However, the totality of the circumstances presented here reveal that the petitioner's attorney was, in fact, laboring under a conflict of interest that adversely affected his performance.

The evidence adduced at the evidentiary hearing revealed that the initial meeting between the petitioner and his attorney, Vernile, was arranged by Simone. Also, this meeting took place at Simone's residence in the presence of both Simone and co-defendant Morrone. The uncontradicted testimony further

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[17] But cf. Model Rules of Professional Responsibility, Comment to Rule 17 ("The potential for conflict of interest in representing multiple defendants in a criminal case is so grave that ordinarily a lawyer should decline to represent more than one co-defendant.") For an excellent discussion regarding the dangers of representing two co-defendants in a criminal case, See Geer, Representation of Multiple Criminal Defendants: Conflicts of Interests and the Professional Responsibility of the Defense Attorney, 62 Minn.L.Rev. 119 (1978).

disclosed that all subsequent meetings were also attended by Simone, Morrone, and sometimes other co-defendants and their counsel. Furthermore, it was not disputed that neither Vernile nor Simone discussed with the petitioner the possibility of choosing non-trial options and specifically did not discuss the possibility of pleading guilty to one or more of the charges or attempt to negotiate a plea agreement with the government in return for lenient treatment.

The Eight Circuit has held that defense counsel does not alsways have to initiate plea bargain negotiations. Thomas v. Lockhart, 738 F.2d 304, 309-10 (8th Cir. 1984); Hawkman, 661 F.2d at 1171; and this Magistrate has found no authority for the proposition that defense counsel has an absolute duty to discuss the possibility of pleading guilty in every case.[18]

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[18] A 1948 Supreme Court decision can be read as imposing the requirement, "Prior to trial an accused is entitled to rely upon his counsel

(Footnote continued on next page)

[18] Footnote Continued:

to make an independent examination of the facts, circumstances, pleadings and laws involved and then to offer his informed opinion as to what plea should be entered." Von Moltke v. Gillis, 332 U.S. 708, 721 (1948). However, due to the factual distinction in Von Moltke, where the defendant did plead guilty, and the lack of necessity for this interpretation in this case, this Report and Recommendation need not address whether Von Moltke imposes such a requirement. See also, United States v. Villas, 416 F. Supp. 887, 889 (S.D.N.Y. 1976). ("Effective assistance of counsel includes counsel's informed opinion as to what pleas should be entered"). The Von Moltke case, however, is relevant to the extent that the Supreme Court recognized that receiving effectice assistance of counsel is as important before trial as it is during the trial. See also Moore v. United States, 432 F.2d 730, 735 (3rd Cir. 1970).

However, here, it is not necessary to decide whether a failure to discuss the possibility of pleading guilty in every criminal case demonstrates that an attorney did not exercise the "customary skill and knowledge which normally prevails at the time and place," thereby rendering his assistance ineffective. Baynes, 687 F.2d at 665 [quoting Moore, 432 F.2d at 736]. This is because the failure of Vernile and Simone to discuss the non-trial options was a direct result of the actual conflict of interest that was present. Here, all meetings between Vernile and the petitioner were in the presence of Simone and co-defendant Morrone. This is exactly the type of situation the Supreme Court cautioned about in Holloway v. Arkansas, 435 U.S. 475, at 490. Chief Justice Burger, writing for the majority, stated, "In a case of joint representation of conflicting interests the evil--it bears repeating--is in what the advocate finds himself compelled to refrain from doing, not only at trial, but also as to possible pretrial

negotiations and in the sentencing process." Holloway, Id. The Chief Justice went on to explain that in the case of multiple representation, the defense may have been precluded from exploring possible plea negotiations and the possibility of an agreement to testify for the prosecution as then counsel would then be placed in the untenable position of having to cross-examine his own client. See also Greer, 62 Minn.L.Rev. at 125. He further stated, "the mere physical presence of an attorney does not fulfill the Sixth Amendment guarantee when the advocate's conflicting obligations have effectively sealed his lips on crucial matters." Holloway, 435 U.S. at 490. Because both co-defendants were present at all the meetings, neither Cimone nor Vernile could recommend that the petitioner cooperate with the government and testify for the prosecution against his co-defendant, without compromising a criminal defense attorney basic duty of loyalty and obligation to avoid conflicts of interest. Strickland,

104 S. Ct. at 205. See, e.g., United States ex rel Hart v. Davenport, 478 F.2d 203, 209 (3rd Cir. 1973) ["the right to counsel guaranteed by the Sixth and Fourteenth Amendments contemplates the service of an attorney devoted solely to the interests of his client. The right to such untrammelled and unimpaired assistance applies both prior to trial in considering how to plead. . . and during trial"] (citations omitted).[19]

In response to this claim, the government argues that: (1) because the petitioner maintained that he was innocent and Vernile believed him to be, "professional norms" do not require counsel to discuss a plea bargain; and (2) this case is "clearly distinguishable from those situations where

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[19] See generally, Model Code of Professional Responsibility, Disciplinary Rule 5-105, stating that a lawyer may not represent a client if the representation may be materially limited by the lawyer's responsibilities to a second client unless the lawyer reasonably believes the representation of the first client will not be adversely affected, and the first client consents after consultation.

defense counsel has failed to relay an offer by the government to the defendant which this Circuit has held to be a per se Sixth Amendment violation. See United States ex rel. Caruso v. Zelinsky, 689 F.2d 435, 438 (3rd Cir. 1982). As to the government's first contention, the evidence revealed that although petitioner may have maintained his innocence, Vernile knew that the petitioner admitted being present at the scene of the Orthodox Street fire[20] and that the government would have the sworn testimony of one of the alleged co-conspirators, Richard Coppola. Furthermore, the petitioner had no prior criminal record while co-defendant Morrone has an extensive record of prior convictions. In light of this evidence, "professional norms" would certainly dictate that

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[20] It should be noted that this admission by the petitioner was specifically relied upon by Judge Ditter when sentencing the petitioner. See Transcript of Sentencing Hearing, November 7, 1980, at 43-44.

Vernile at least entertain the possibility of pleading guilty or initiating plea bargain negotiations. Hawkman, 661 F.2d at 1170.[21] Secondly, the government is correct in pointing out the factual distinction between Zelinsky and the instant case, but it fails to cite to any authority for the requirement that the government would have had to accept the agreement. This requirement would be imporper for a number of reasons. First, it would be cirtually impossible to determine what the government would have done without endeavoring in "unguided speculation." A recent Eleventh Circuit case had held that to require a defendant to show a plea bargain would have been accepted would be to require prejudice, which need not be shown here. Ruffin v. Kemp, 767 F.2d 748, 750 (11th Cir) 1985). Thirdly, without being

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[21] In Hawkman, The Eight Circuit concluded that the failure of the defense counsel to initiate plea negotiations given the facts present, which were somewhat similar to those recited above in the instant case, was a Sixth Amendment violation which constituted prejudice. As noted above, prejudice need not be shown in our case as it is presumed.

informed of this possible alternative, the accused does not have the opportunity to make this very important decision, which is his to make and not his attorney's. Zelinsky, 689 F.2d at 438.[22]

Another troublesome circumstance in this case is the fact that Simone and Vernile represented the owners and operators of Archway Tavern, Inc. in their fire insurance claim regarding the very same fire named in the indictment of this case. At the evidentiary hearing, the petitioner introduced into evidence the transcripts of the sworn statements by those owners, Camillo D'Amico and Thomas Nicolussi. (Petitioner's Exhibit #1). Both D'Amico and Nicolucci gave sworn statements in the presence of Vernile, who had entered an appearance on behalf of Simone,

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[22] Since it is well settled that a defendant who decides to plead guilty be well informed of the consequences of such a plea, there seems to be no reason why a person who decides to plead not guilty also be entitled to make the same type of informed decision.

denying and involvement in the fire and stating that they had no knowledge of how the fire started or who was responsible for it.

Neither Vernile nor Simone attempted to contact or subpoena the Archway Tavern principals to testify for the defense nor were their sworn statements introduced into evidence. D'Amico testified at the evidentiary hearing that had he been called as a witness at the petitioner's trial in 1979, he would have testified that he would have reiterated the evidence in his sworn statement. He also stated he would have testified that he did not hire the petitioner or anyone else to burn down his place of business (B-4, 5). The petitioner argues that this testimony "would have been relevant, material, and critical to the outcome of this trial, at least in relation to Counts 18 and 19 of the Indictment." (Brief for petitioner, at 14). In response, the government argues that this testimony, "would have

been irrelevant inasmuch as the government neither charged nor argued that the arson at 62-66 North Front Street (Archway Tavern) was committed for the purpose of obtaining insurance proceeds," citing the Statute contained in the Indictment (18 C.P.S.A. §3301(b)(1) set out in N.1) which does not mention anything about setting fire for the purpose of obtaining insurance proceeds.

A careful examination of the Indictment reveals that the thrust of the government's theory in the case was that the petitioner was part of an "enterprise"[23] that was involved in a cinspiracy with the owners or occupiers of certain buildings whose plans were to set fire to buildings in order to defraud the respective insurance companies. It is a fact that the government charged mail fraud counts based on this theory vis-a-vis

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[23] As defined in 18 U.S.C §1961(4), "enterprise includes any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity.

two of the fires involved but did not do so regarding the Archway Tavern fire. However, at no point during the trial did the government attempt to separate the fires in such a way in proving their case to the jury. At the evidentiary hearing, the Unites States Attorney in charge of the case, stated that he argued at trial that the petitioner's role in the two fires involving the mail fraud counts was to set the fires in order to defraud the respective insurance companies(A-88). He further testified that he did not argue that the petitioner was doing something different with regard to the Archway Tavern fire because of the aforementioned reason that he simply charged arson and not arson for fire in the indictment.[24] Notwithstanding what crime was charged in the Indictment, based on

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[24] It should be noted that Archway Tavern was specifically mentioned in Counts 18 and 19 of the Indictment, although the owners, Nicolucci and D'Amico were not charged.

the government's theory in this case and their presentation of evidence at trial, there is no question that this evidence was "relevant" as defined by Federal Rule of Evidence 401 given the liberal definition consistently applied to that term. See Notes on Advising Committee on Proposed Rules (to Rule 401) 1985 Revised Edition. However, it is not the opinion of this Magistrate that this evidence was "critical to the outcome of this trial" and hence prejudicial as the petitioner argues.

Nevertheless, the prior representation by Simone and Vernile of the Archway Tavern principals and their failure to call them as witnesses at trial[25] or introduce sworn statements that would have been relevant is just another particular fact that leads to the

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[25] It should be noted that during the evidentiary hearing, Vernile stated, on cross-examination, "Based on what I have heard today . . . you'd have to argue I was remiss in not calling them." (B-54).

conclusion that there was a Sixth Amendment violation based on a conflict of interest in this case.[26]

One final problem in this case is that Simone had previously met with Richard Coppola, the government's chief witness in this case and an admitted co-conspirator in the Indictment. The evidence reveals that Simone and Coppola met sometime after Coppola was arrested but before the indictment was returned.

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[26] I want to stress that if this were the sole fact petitioner relied upon to prove his Sixth Amendment claim, there is no doubt the petitioner would fail. It is just one of many peculiar circumstances in this case that leads to the conclusion that there was actual conflict of interest present that adversely affected counsel's performance. It should be stated though, that common sense dictates that an attorney should not undertake representation of a criminal defendant who is charged with setting fire to a building when that attorney previously represented the owners of that building in the insurance claim regarding the very same fire. At the very least, this conduct is unethical given the Model Code of Professional Responsibility, Cannon 9, "An attorney should avoid even the appearance of impropriety."

During these "one or two meetings" at Simone's office, Coppola apparently told Simone that he was charged with arson and that he wanted Simone to represent him at the preliminary hearing. (B-10, 11, 12, 13, 14). At the hearing, Simond stated that Coppola told him very little during those meetings, but did mention that he told him he was burned (his legs were all bandaged up at this time) but that it had nothing to do with the fire for which he was arrested (B-15). At trial, Coppola testified that he was burned in the Archway Tavern fire (See N.8).

The government does not dispute that an attorney-client relationship existed between Simone and Coppola and this Magistrate believes that such a relationship did exist. An attorney-client relationship can arise when a lay person submits confidential information to an attorney with a reasonable belief that the latter was acting as his attorney.

Westinghouse Electric Corp. v. Kerr-McGee Corp., 580 F.2d 1311, 1316-17 (7th Cir.

1978). Such a relationship does not depend on the payment of fees or execution of a formal contract. Id. at 1317.

In United States v. Jeffers,[27] Justice (then Judge) Stevens pointed out the problems included in this type of situation;

> "In cases in which the alleged conflict of interest is based on the prior representation of a prosecution witness by defense counsel... there are two factors that arguably may interfere with effective cross-examination, and therefore, the effective assistance of counsel. First is concern that the lawyer's pecuniary interest in possible future business may cause him to avoid vigorous cross-examination...The second is the possibility that privileged information obtained from the witness might be relevant to the cross-examination." Jeffers, 520 F.2d at 1264-65.[28]

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[27] 520 F. 2d 1256 (7th Cir. 1975), cert. denied, 423 U.S. 1066 (1976).

[28] In Castillo v. Estelle, 504 F. 2d 1243, 1245 (5th Cir. 1974), the Fifth Circuit held that concurrent representation of a criminal defendant and the government's chief witness in an unrelated civil matter is a conflict of interest amounting to a denial of effective representation as a matter of law. Although this case involved concurrent representation and not prior representation as we have in the instant case, the principles

[28] Footnote continued

announced were sufficiently analogous to illustrate the dangers inherent in these types of situations. The Court stated, "In these circumstances, counsel is placed in the unequivocal position of having to cross-examine his own client as an adverse witness, his zeal in defense of his client, the accused, is thus counterpoised against solicitude for his client, the witness. The risk of such ambivalence is something that no attorney should accept and that no court should countenance." 504 F.2d at 1245. In Stephens v. United States, 435 F.Supp. 1202 (M.D.Fla. 1978), a motion to vacate sentence pursuant to 28 U.S.C. §2255 was denied where the defense attorney represented a key government witness. I find this case inapplicable because inter alia, it was decided under a pre-Cuyler standard requiring prejudice to be shown.

The only relevant concern in the instant case is the second factor announced in Jeffers which essentially is what the petitioner contends. In response, the cogernment avers that Simone received very little information from Coppola during their meetings and, according to Simone's testimony, he did not feel limited in his cross-examination of Coppola (B-13). The government further contends that, during trial, Simone cross-examined Coppola "at length over a two-day period," and the one area Simone remembers receiving information from Coppola was "covered" by Simone during this cross-examination.

First after a careful review of the trial transcript, there is no question that Simone extensively cross-examined Coppola impeaching his credibility a number of times. However, the fact that an attorney may have performed impressively at trial does not excuse the duty of a defense attorney to investigate into all potential exculpatory

defenses and evidence. Baynes, 687 F.2d at 667-68. Moreover, the government's argument that the information received by Simone during his representation of Coppola was "covered" at trial is not wholly correct. A review of the trial transcript cited by the government to support this allegation reveals that Coppola at this point testified that he was burned in the Archway Tavern fire and that the petitioner saved his life by pulling him out of the fire. Trial Transcript, 7/20/79 at 288.

Coppola further testified that he was taken to a doctor after the fire and told the doctor that the burns on his legs were from an accident while he was working on his car. Id. at 289-99. However, it is at this precise point in the cross-examination of Coppola that Simone could have further impeached him with the information he received while he was representing Coppola. Namely, that he also told his attorney at that time that he was not involved in the setting of the fires he

was charged with and that the burns on his legs were not related to those fires. It would be "unguided speculation" to say that this further impeachment of Coppola by Simone would have any impact on the jury's determination in this case. However, prejudice need not be shown here and this fact taken in combination with all the other particular circumstances of this case analyzed above, is just another problematic factor that leads to the conclusion that there was an actual conflict of interest present in this case.[29]

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[29] Another argument put forth by the petitioner is that the government attorney failed to reveal to the defendant certain exculpatory evidence regarding Simone's prior representation of Coppola; and Simone and Vernile's prior representation of Archway Tavern and its principals in violation of Brady v. Maryland, 373 U.S. 83 (1963) and its progeny. This argument is without merit for the following reasons: (1) The evidence presented at the evidentiary hearing does not conclusively reveal that the government possessed this information; (2) Even if they did possess it, there has not been a sufficient showing that the evidence was, in fact, exculpatory; and (3) Even assuming the government possessed this information and it was exculpatory, the defense counsel, Simone and Vernile were both aware of this evidence.

CONCLUSION

For the foregoing reasons, I conclude that the movant was deprived of the assistance of counsel in violation of the Sixth Amendment of the United States Constitution.

After reviewing the record of proceedings in the United States District Court for the Eastern District of Pennsylvania and the evidence adduced at the evidentiary hearing before this Magistrate, I conclude that the files and records of the case conclusively reveal that the movant is entitled to relief and the motion should be granted. The decision as to whether or not bail shall be posted is pending the dispostion of this case by the District Court.

Accordingly, this United States Magistrate makes the following:

RECOMMENDATION

NOW, this 20th day of December, 1985, it is RESPECTFULLY RECOMMENDED that:

1. The Findings and Recommendation of the United States Magistrate be Approved and Adopted.

2. The motion to vacate, set aside, or correct the sentence be granted; the execution of the motion should be stayed for a period of sixty (60) days from the date of the Order of the Court to allow the United States Government an opportunity to appeal as provided by law or to relist the Bill of Indictment for a speedy trial.

EDWIN E. NAYTHONS
UNITED STATES MAGISTRATE

CERTIFICATE OF SERVICE

I hereby certify that I served three (3) copies of the within Petition for a Writ of Certiorari on the government's attorney Frank J. Marine, Esquire, at the United States Department of Justice, P.O. Box 14263, Ben Franklin Station, Washington, D.C. 20044, by United States Mail, postage prepaid on the date set forth below.

Date: June 4, 1987

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